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# In The
# Supreme Court of the United States

October Term, 1940

No. 48

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STATE OF WISCONSIN nad ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY, a Delaware Corporation,

Respondent.

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# Brief of Respondent

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FREDERICK J. MILLER,
Ryan Block,
Little Falls, Minnesota.
JOHN L. CONNOLLY,
900 Fauquier Ave.,
St. Paul, Minnesota.
G. BURGESS ELA,
1 West Main Street,
Madison, Wisconsin.
Attorneys for Respondent.

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MISCELLANEOUS

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## I.
## THE OPINION OF THE COURT BELOW.

The opinion delivered in the court below is reported in 233 Wis. (Advance Sheets, No. 3) 306, and also reported in 289 N. W. 686.

## II.
## JURISDICTION.

The jurisdiction of this court was invoked under the provisions of Sec. 237b of the Federal Judicial Code (28 U. S. C. A. 344 (b) ).

This court issued a writ of certiorari in this case to review the judgment of the Supreme Court of the State of Wisconsin. The respondent in this case, in its brief filed in opposition to the petition for the granting of the writ, contended that the decision of the Wisconsin Supreme Court was based upon an independent ground of state law and further contended that there was no substantial federal question involved. Respondent reiterates these contentions and in support thereof incorporates by way of reference the arguments contained in its brief filed in opposition to the petition for writ of certiorari, pages 3-16 inclusive.

## III.
## STATEMENT OF CASE.

This action involves the constitutionality of Section 3 of Chapter 505 of the Laws of Wisconsin for 1935, as amended by Chapter 562 of the Laws of Wisconsin for 1935, as amended by Laws of Wisconsin for 1937, Chapters 223 and 309, imposing a so-called privilege dividend tax.

The respondent is a corporation duly organized and existing by virtue of the laws of the State of Delaware, with its principal place of business in the City of Saint Paul, State of Minnesota; and operating a

factory manufacturing Colorquartz at Wausau, Wisconsin; also operating factories at Detroit, Michigan, Copley, Ohio, and Saint Paul, Minnesota. (R. p. 5).

The respondent's Wausau factory ships its products to Chicago and points West. The sales from the Wausau plant are handled through a Mr. Voss, who has an office in Chicago. He contacts various roofing companies and gets orders for roofing granules, sends the orders to Saint Paul; and shipping instructions are sent from roofing companies to Saint Paul, where decision is made as to when the shipment shall be made. When shipments are made, the Wausau plant prepares a shipping ticket, upon which is shown the tonnage shipped. The ticket is sent to Saint Paul, where it is priced and the bill sent from Saint Paul to the consumer. The consumer then remits directly to the respondent's Saint Paul office, and proceeds are deposited in Saint Paul banks. The Wisconsin employes of respondent are paid on time cards prepared at the Wausau plant and sent to Saint Paul, where extensions are made and checks are drawn on a Wausau bank, signed by an officer at Saint Paul, and sent to the Wausau plant manager for distribution. A deposit in equal amount to the total of the payroll is sent the same day to the Wausau bank. (R. 65).

The collections from the customers of the respondent's Wausau plant are deposited in a Saint Paul bank, and these funds are commingled with funds from respondent's other factories and other divisions of its business, including income from intangibles. These funds are then used to pay bills, royalties, and

dividends. (R. 65).

Respondent, in 1935, received $10,191.37 and in 1936, $14,331.65 — interest from Federal securities. These securities were actually kept in the vault of a bank in Saint Paul, coupons were clipped at the bank in Saint Paul and deposited in the Saint Paul bank for collection. No part of the interest was ever received, paid, or deposited in the State of Wisconsin. (R. 65-66).

Respondent, in 1935, received dividends of $328,096.23 and interest from other than Federal securities of $27,125.17 and interest on State obligations of $173.25. In 1936 respondent received dividends of $254,834.00 and interest from obligations other than Federal of $7,797.53. None of the interest on any of the bonds which was received by the respondent for the years 1935 and 1936 was secured by any mortgage or trust deed on any Wisconsin property; and none of the dividends was received on any stock from any company operating or doing business in Wisconsin in the years 1935 and 1936. (R. 66).

Respondent, in 1935, received royalties on patents owned by it of $154,447.53, of which $224.20 were earnings in Wausau, Wisconsin, leaving a balance of $154,223.33 earned by the respondent and received by the respondent outside the State of Wisconsin. (R. 66).

Respondent, in 1936, received royalties on patents owned by it of $153,623.35, of which $144.76 were royalties used in the Colorquartz operations at Wausau, Wisconsin, leaving a balance of $153,478.59 earned from royalties outside the State of Wisconsin.

(R. 67).

It was stipulated by the parties hereto that the intangibles from which the royalties were derived had no business situs in Wisconsin. (R. 67).

Respondent's 1935 income was derived from the following sources:

| Source | Amount | |
|---|---|---|
| Dividends | $328,096.23 | (R. 66). |
| Interest Bonds | 27,125.17 | (R. 66). |
| Interest U. S. Obligations | 10,191.37 | (R. 65). |
| Interest State Obligations | 173.25 | (R. 66). |
| Royalty on Patents | 154,447.53 | (R. 66). |
| Wisconsin Earnings (factory) | 261,157.62 | (R. 70). |
| Earnings: Saint Paul, Minnesota; Copley, Ohio; Detroit, Michigan (factories) | 1,373,924.79 | (R. 70). |
| | $2,155,116.96 | |

On January 1, 1936, respondent's total stockholders were 1,961, owning 961,260 shares of stock, distributed in practically every State in the Union. (R. 62). There were 42 stockholders in Wisconsin, owning 3,006 shares. Since January 1, 1936, 347 stockholders, owning 138,747 shares of stock have transferred their stock. Of this number 20 reside in Wisconsin, owning 1,377 shares of stock. On January 1, 1938, there were 44 Wisconsin stockholders owning 4,944 shares of stock. (R. 62).

All dividends of the respondent are declared at meetings of the Board of Directors in Saint Paul, Minnesota. No dividends are declared in Wisconsin. (R. 68).

When dividends are declared by the directors, a check is drawn on the First National Bank of Saint Paul for the full amount of the dividend, including the treasury stock, payable to the First Trust Company of Saint Paul, its transfer agent. (R. 68) It

actually pays the dividends to the stockholders of the respondent and returns the dividend allotted to the number of shares held by the respondent. (R. 68). None of the money which is turned over to the transfer agent at the time the dividends are declared is drawn on any Wisconsin bank. (R. 68).

Respondent's dividends purported to be taxed:

| Type of Stock | Date Declared | Date Paid | Amount |
|---|---|---|---|
| Common | 12-16-35 | 1-2-36 | $ 215,909.83 |
| Common | 3-10-36 | 4-1-36 | 216,380.97 |
| Common | 6-17-36 | 7-1-36 | 288,278.00 |
| Common | 9-22-36 | 10-1-36 | 336,441.00 |
| Common | 12-7-36 | 12-22-36 | 624,819.00 |
| | | Total dividends declared..... | $1,681,828.80 |

(R. 48; Exhibit 3, Schedule 3)

The tax imposed upon the respondent was $6,382.75. (R. 48; Exhibit 3, Schedule 1). If the tax was for the payment in Wisconsin by the respondent through its transfer agent of its dividends to Wisconsin residents, the tax would have been $131.49. (R. 10). On each of the dates dividends were declared and / or paid by the respondent the number of stockholders residing in the State of Wisconsin has not been greater than 42 and the number of shares held by stockholders in Wisconsin has not been greater than 4,944. (R. 64). Tabulating the amounts received by Wisconsin residents from the payment of respondent's dividends the proportion of such amounts received by Wisconsin residents allocable to Wisconsin earnings (based on the computation used by the Tax Commission in reaching the assessment) and the tax on the amount received by the Wisconsin residents allocable to Wisconsin earnings (based upon the figures used by the Tax Commission) are as follows:

| Dividend Date | (1) | | (2) | | (3) |
|---|---|---|---|---|---|
| 1- 2-36 | $215,909.83 x .003127 | | $ 675.15 x 2.5% | | $ 16.88 |
| 4- 1-36 | 216,380.97 x .003127 | | 676.62 x 2.5% | | 16.92 |
| 7- 1-36 | 288,278.00 x .003127 | | 901.45 x 2.5% | | 22.54 |
| 10- 1-36 | 336,441.00 x .003127 | | 1,052.05 x 2.5% | | 26.30 |
| 12-22-36 | 624,819.00 x .003127 | | 1,953.81 x 2.5% | | 48.85 |
| | | Total | | | $131.49 |

(1) represents the total amounts received by the Wisconsin residents on the payments of the respective dividends.
NOTE: The above statements—(1)—is copied from the Record, but the Record is incorrect. It should read:
(1) represents the amount of dividends paid in 1936.

(2) represents the portion of such amounts received by Wisconsin residents allocable to Wisconsin earnings, based on the percentage finally determined to be used by the decision of the Wisconsin Tax Commission.

(3) represents the tax on amounts received by Wisconsin residents allocable to Wisconsin earnings. (R. 10).

The respondent does not maintain a separate system of accounts for its operations at Wausau. The respondent's Wisconsin operations are susceptible and have been allowed on a separate accounting basis. The following is a statement of its assets and liabilities in use at Wausau at the end of the years 1934, 1935, and 1936:

**ASSETS**

| | 1934 | 1935 | 1936 |
|---|---|---|---|
| Cash | $ 4,830.42 | $ 8,645.82 | $ 6,769.06 |
| Real Estate | 12,364.00 | 12,664.00 | 14,148.55 |
| Buildings | 189,420.87 | 361,149.46 | 370,084.52 |
| Machinery | 333,790.69 | 351,575.96 | 356,828.82 |
| Colorquartz Machinery | 179,259.66 | 256,736.74 | 257,004.25 |
| Inventory | 93,742.75 | 194,868.45 | 266,509.27 |
| Total | $ 813,408.39 | $1,185,640.43 | $1,271,344.47 |

**LIABILITIES**

| | | | |
|---|---|---|---|
| Reserve for Depreciation—Buildings | $ 6,437.48 | $ 17,448.90 | $ 32,073.59 |
| Reserve for Depreciation—Machinery | 25,714.09 | 59,182.01 | 94,545.03 |
| Reserve for Depreciation—Colorquartz | 14,863.36 | 36,868.60 | 62,435.29 |
| Net Earnings | 7,999.84 | 266,494.25 | 449,042.97 |
| Accrued State Income Tax | | 2,663.21 | 3,635.80 |
| Net Advances by Saint Paul | 758,393.62 | 802,983.46 | 629,611.79 |
| Total | $ 813,408.39 | $ 1,185,640.43 | $ 1,271,344.47 |

(R. 62).

All of the respondent's 1935 earnings plus $44,589.84 advanced from Saint Paul were used to make capital investments in Wisconsin. In 1936, $173,371.67 of respondent's income of $182,548.72 was used to repay advances from Saint Paul.

In December, 1929, the respondent commenced operations of its Wausau plant. It made no income in Wisconsin that year or any prior years. (R. 68).

The following table shows the respondent's Wisconsin earnings, total earnings, and dividends paid:

| | Wisconsin Income | Total Net Income | % Wis. to Total | | Dividends Paid | Dividends to from Wis. Earnings |
|---|---|---|---|---|---|---|
| 1930 | $ 2,396.37 | $ 685,707.54 | .003494 | 1931 | $ 548,176.60 | $ 1,915.33 |
| 1931 | 11,527.67 | 649,547.09 | 1.7678 | 1932 | 500,001.66 | 8,839.03 |
| 1932 | 920.77* | 448,588.07 | | 1933 | 381,071.44 | |
| 1933 | 10,212.78 | 899,829.21 | 1.1349 | 1934 | 566,671.61 | 6,431.16 |
| 1934 | 15,216.23* | 1,203,820.30 | | 1935 | 690,738.54 | |
| 1935 | 261,157.62 | 2,155,116.96 | 12.1180 | 1936 | 1,679,692.55 | 203,308.74 |

(*) Indicate lossess.
(1) Wisconsin Income. (R. 68-70).
(2) Total Net Income. (R. 76).
(3) Dividends Paid Less Dividends on Treasury Stock. (R. 71).
(4) Dividends from Wisconsin Earnings. (R. 71).

The respondent, feeling that Section 3 of Chapter 505 of the Wisconsin Session Laws for 1935, as amended, was unconstitutional, refused to file a return under the provisions of said act, and the Tax Commission, on August 13, 1937, assessed a privilege dividend tax under said act against the respondent in the sum of $6,382.75 with interest amounting to $505.01 computed to September 30, 1937. (R. 45).

The respondent filed an application and amended application for hearing on said assessment within the time prescribed by law. (R. 48-62). A hearing was had on said application and amended application, resulting in the entry by the Wisconsin Tax Commission of a decision and determination that the tax be $5,471.06 with interest amounting to $894.52, or a total of $6,365.58. (R. 36; Exhibit II).

The respondent took an appeal from the order of the Tax Commission to the Circuit Court for Dane

County, Wisconsin, (R. 2-38), which court, on June 10, 1939, entered an order confirming the order of the Tax Commission, dated December 19, 1938, and the privilege dividend tax imposed upon the dividends declared by the respondent on January 2, 1936, April 1, 1936, July 1, 1936, October 1, 1936, and December 22, 1936. (R. 83-86). The respondent took an appeal from the order of the Circuit Court of Dane County to the Supreme Court of the State of Wisconsin on June 12, 1939. (R. 87-88). The Supreme Court of the State of Wisconsin reversed the judgment of the Circuit Court of Dane County, sustaining the Tax Commission on January 16, 1940. (R. 94-96).

The following provisions of the Constitution of the United States are involved on this appeal:

Section 1 of Fourteenth Amendment to the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 8, Constitution of the United States:

> "The Congress shall have power * * *
>
> "To borrow money on the credit of the United states;

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; * * * "

Article I, Section 10, Constitution of the United States:

"No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

"No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No state shall, without the consent of Congress, lay any duty of tonnage, keep troups, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Article IV, Section 1, Constitution of the United States:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner

in which such acts, records and proceedings shall be proved, and the effect thereof."

The following sections of the Wisconsin Constitution are involved on this appeal:

Article I, Section 1, Wisconsin Constitution:

"Equality. Section 1. All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

Article I, Section 12, Wisconsin Constitution:

"Attainder; Ex Post Facto; Contracts. Section 12. No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed, and no conviction shall work corruption of blood or forfeiture of estate."

Article VIII, Section 1, Wisconsin Constitution:

"Rules of Taxation; Income Taxes. Section 1. The rule of taxation shall be uniform, and taxes shall be levied upon such property with such classifications as to forests and minerals, including or separate or severed from the land, as the legislature shall prescribe. Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

## IV.

## ARGUMENT.

POINT A. The Supreme Court of Wisconsin in **State ex rel. Froedtert G. & M. Co. Inc. v. Tax Commission,** (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, erroneously held that the State of Wisconsin had jurisdiction to tax the declaration and payment of dividends by a foreign corporation where the transaction took place in a foreign state, on the theory that jurisdiction to tax attached because payment constituted a devolution of income originally earned within the State of Wisconsin. In accordance with well settled principles of constitutional law as established by decisions of this Court, the Wisconsin Supreme Court in the instant case and in the case of **J. C. Penney Co. v. State of Wisconsin and Elmer Barlow,** etc., 233 Wis. 286, decided after the Froedtert case, properly held that a law attempting to impose such a tax was unconstitutional under the Fourteenth Amendment to the Constitution of the United States.

POINT B. The Wisconsin Supreme Court properly held that the principles of law announced by this Court in the **Connecticut General Life Ins. Co. v. Johnson,** 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436, were squarely applicable to the constitutional questions in the instant case and that on the authority of that case and other settled principles of constitutional law the Wisconsin privilege dividend tax law,

as applied to the respondent, was unconstitutional under the Fourteenth Amendment to the United States Constitution.

POINT C. The mere fact that income originally earned and taxed in Wisconsin is removed from the State of Wisconsin and later is included in a transaction which occurs wholly outside of the State of Wisconsin (in this case, the payment of a dividend), clearly does not give to the State of Wisconsin jurisdiction to tax the transaction involved.

POINT D. The decision rendered by the Supreme Court of the State of Wisconsin in the instant case, properly applied the relevant provisions of the Constitution of the United States and properly construed and applied the decisions of this Court with respect to jurisdiction of the State of Wisconsin to levy the tax in question.

POINT E. The tax law in question is unconstitutional not only under the Fourteenth Amendment to the Constitution of the United States, but is unconstitutional under several other provisions of the Constitution of United States.

## POINT A.

THE SUPREME COURT OF WISCONSIN, IN **STATE EX REL. FROEDTERT G. & M. CO. INC. v. TAX COMMISSION,** (1936) 221 wis. 225, 265 N. W. 672, 267 N. W. 52, ERRONEOUSLY HELD THAT THE STATE OF WISCONSIN HAD JURISDICTION TO TAX THE DECLARATION AND PAYMENT OF DIVIDENDS BY A FOREIGN CORPORATION WHERE THE TRANSACTION TOOK PLACE IN A FOREIGN STATE, ON THE THEORY THAT JURISDICTION TO TAX ATTACHED BECAUSE PAYMENT CONSTITUTED A DEVOLUTION OF INCOME ORIGINALLY EARNED WITHIN THE STATE OF WISCONSIN. IN ACCORDANCE WITH WELL SETTLED PRINCIPLES OF CONSTITUTIONAL LAW AS ESTABLISHED BY DECISIONS OF THIS COURT, THE WISCONSIN SUPREME COURT, IN THE INSTANT CASE AND IN THE CASE OF **J. C. PENNEY CO. v. STATE OF WISCONSIN AND ELMER E. BARLOW,** etc., 233 Wis. 286, DECIDED AFTER THE FROEDTERT CASE, PROPERLY HELD THAT A LAW ATTEMPTING TO IMPOSE SUCH A TAX WAS UNCONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioners' approach on this review assumes that the decision of the Wisconsin Supreme Court in the case of **State ex. rel. Froedtert G. & M. Co., Inc. v. Tax Commission,** (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, was correct and that its subsequent decisions in the instant case and in the case of **J. C.**

**Penney Company v. State of Wisconsin and Elmer E. Barlow, etc., 233 Wis. 286, are incorrect. Petitioners' main approach in the matter is an attempt to justify the decision in the Froedtert case and to condemn the subsequent decision of the Supreme Court of the State of Wisconsin in the instant case. The only basis on which petitioners apparently contend that the decision of the Froedtert case can be justified is on the theory that the constitutionality of the tax was determined in that case by the same principles as apply to a determination of the validity of inheritance or estate tax laws. After an analysis of the decision in the Froedtert case counsel at page 27 of this brief state, "it becomes necessary to determine whether, on the basis of such an analogy, the tax can be sustained under the Fourteenth Amendment to the United States Constitution as interpreted by the decisions of this Court."**

Counsel, so far as any authority to justify the constitutionality of the tax in question is concerned, apparently rely almost so ely and exclusively on the alleged analogy between cases sustaining the constitutionality of inheritance and estate taxes and the tax in the instant case.

But the attempted analogy, which counsel urge, we submit, is palpably lacking, and we submit that the cases cited by petitioners in an effort to support the alleged analogy are not remotely applicable to the issue involved in this case.

The primary question directly involved on this review is whether the Supreme Court of the State of Wisconsin was correct in holding that Wisconsin

had no jurisdiction to tax the transaction in question because the transaction took place beyond the jurisdiction of the state.

It does not aid in the discussion of the matter to talk about "constructive situs" of the transaction. To hold or to argue that there is a constructive situs of the transaction within the State of Wisconsin is but an indirect way of contending that there is jurisdiction to tax. Fundamentally, the sole direct issue is whether Wisconsin has jurisdiction to tax a transaction concededly taking place outside of the borders of the state, solely and only because part of the property involved in the transaction may have been originally earned within the State of Wisconsin and was subject to and paid an income tax within the State of Wisconsin. (It is not conceded that any income earned in Wisconsin was distributed as dividends in 1936.)

It should be noted in passing that the decision of the Wisconsin Supreme Court in **State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,** 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, was strictly dictum, so far as the determination of constitutionality of the law as applied to foreign corporations is concerned. The question directly involved in the Froedtert case was solely and only a question on the application and the constitutionality of the law as applied to a domestic corporation. No record was before the court which in any way, either directly or indirectly, involved the factual processes of declaration of dividends by foreign corporations. While it is true that the court on motion for rehearing

passed upon the constitutionality of the law as applied to foreign corporations, nevertheless the decision in that case in this respect was strictly dictum.

Furthermore, it should be distinctly noted that the decision in the Froedtert case was rendered at a time prior to the decision of this court in **Connecticut General Life Ins. Co. v. Johnson,** 303 U. S. 78, 32 L. ed. 673, 58 S. Ct. 436.

It would appear to approach intellectual deceit to talk about the constructive situs of a physicial act. The law taxes the act of declaring and receiving dividends. Such an act is of a tangible nature. In the nature of things it can only occur in one place. The Supreme Court of the State of Wisconsin in **State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,** 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, and in the case of **J. C. Penney Company v. State of Wisconsin and Elmer E. Barlow, etc.,** 233 Wis. 286, has repeatedly held that the tax in question is solely and only a tax on the transaction, that is, an excise tax on the privilege of declaring and receiving dividends from income earned or property located in Wisconsin.

That the Supreme Court of the State of Wisconsin considers the tax as solely and only a privilege tax or an excise tax conclusively appears in the **Froedtert case** in the following excerpts. At page 231 of the Wisconsin Reporter the court states:

> "The briefs in opposition to the tax are largely beside the case, because they do not recognize the true nature of the tax. **The tax is a privi-**

> **lege tax,** or an excise tax, one form of which is a tax imposed on the transfer of property. **** These taxes are best characterized as a tax on the transaction involved.***".

and at page 233:

> "However the legislature may have regarded the tax, we have no difficulty in construing the statute as imposing an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders."

and at page 235:

> "But the tax is an excise tax, a tax on the transaction involved. It is an excise tax imposed on the devolution of income, derived from transaction of business within the state, which is confessedly a proper subject of taxation."

and in the opinion in the **Froedtert case,** on the motion for rehearing, the court at page 240:

> "Our position is that the tax is an excise tax on the transfer of earnings resulting from property located or business transacted within this state, and stands on the same basis of constitutionality that a state inheritance stands; * * *"

Chief Justice Rosenberry, in **J. C. Penney Co. v. State of Wisconsin and Elmer Barlow, etc.,** 233 Wis. 286, again conclusively holds at page 291 of the Wisconsin Reporter:

> "It is agreed on all sides that the tax in question is an excise tax, and this court so held in the **Froedtert case.**"

1.

**The Construction by The Supreme Court of Wisconsin of section 3, chapter 505, Laws of Wisconsin (as amended by Chapter 552, Laws of Wisconsin, 1935) in the Froedtert case (State Ex Rel. Froedtert G. & M. Co., Inc. v. Tax Commission, (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478) and in the instant case and in the case of J. C. Penney Company v. State of Wisconsin and Elmer Barlow, etc., 233 Wis. 286, and the determination of the nature and effect of the tax in both cases is final and conclusive upon this Court.**

The Supreme Court of Wisconsin, in the **Froedtert case (State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,** (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478), and in this case below, held that the tax was an excise tax for the privilege of declaring and receiving dividends out of income derived from property located and business transacted in the State of Wisconsin.

In **Ward & Gow v. Krinsky,** (1922), 259 U. S. 503, 66 L. ed. 1033, this Court on page 510 of the United States Reporter, by Mr. Justice Pitney, said: (of a state court's construction of a workmen's compensation act claimed to violate the rights of employers under the Fourteenth Amendment)

> "In the exercise of our appellate jurisdiction we are bound by the construction of the state law adopted by its court of last resort; hence for present purposes it must be taken as settled that the legislature intended the compensation law as

amended to apply to an employee in Krinsky's situation, precisely as if it were so declared in the words of the statute. Our function is confined to determining whether, as so construed and as applied to the concrete facts of the case, the statute contravenes the limitations imposed by the Fourteenth Amendment upon state action."

The case of **Dawson v. Kentucky Distilleries Co.**, 255 U. S. 288, 65 L. ed. 645, dealt with a tax described in the act as "an annual license tax." It was held to be in fact a property tax. This Court, by Mr. Justice Brandeis, said on page 292 of the United States Reporter:

"Here we are concerned only with the taxes which are alleged to be upon 'the business of owning and storing such spirits in bonded warehouses.' The question is whether as to such this fifty cents a gallon tax is an occupation tax or is a property tax. The question is one of local law, so that a decision of it by the highest court of the State would be accepted by us as conclusive."

In **Fox v. Standard Oil Co.**, 294 U. S. 87, 79 L. ed. 780, this Court, on page 96, by Mr. Justice Cardozo, said:

"The complainant was at liberty to maintain a suit in the state courts where the meaning of the statute could have been determined with finality."

In **Laurel Hill Cemetery v. San Francisco**, 216 U. S. 358, 54 L. ed, 515, this Court, by Mr. Justice Holmes, referred to the "great reluctance" which the Court feels "to interfere with the deliberate decisions of the

highest court of the state whose people are directly concerned."

**Memphis & Charleston Railway Company v. Pace et al,** 282 U. S. 241, 75 L. ed. 315, dealt with a tax levied to make a partial payment upon bonds issued by the Oldham road district in Tishomingo County, Mississippi. This Court, on page 244, by Mr. Justice Van Devanter, said:

> "The supreme court of the state in the decision under review holds that the creation of the road district, the issue of the bonds and the levy of the tax were all valid under the state Constitution and the acts before cited; * * * These were all questions of state law, and their decision by that court is controlling here."

This Court, in **Highland Farms Dairy, Inc, v. Agnew,** 300 U. S. 607, 81 L. ed. 835, speaking through Mr. Justice Cardozo, said on page 613:

> "A judgment by the highest court of a state as to the meaning and effect of its own constitution is decisive and controlling everywhere."

The case of **Bacon & Sons v. Martin,** 305 U. S. 378, 83 L. ed. 233, dealt with a tax imposed upon the "receipt" of cosmetics in the state by any Kentucky retailer. This Court, on page 381, Per Curiam, said:

> "The construction of the statute by the state court is binding upon us. **Supreme Lodge, K. P. v. Meyer,** 265 U. S. 30, 32, 33, 68 L. ed. 885, 887, 888, 44 S. Ct. 432; **Hicklin v. Coney,** 290 U. S. 169, 172, 78 L. ed. 247, 249, 54 S. Ct. 142; **Hartford Accident**

**& Indemnity Co. v. Nelson Mfg. Co., 291 U. S. 352, 358, 78 L. ed. 840, 845, 54 S. Ct. 392.**

2.

**Analysis of Petitioner's Point A and B.**

Petitioners' arguments have been grouped under Points A, B, C and D.

Under Points A and B, petitioners cite several decisions of this Court, in which it is claimed, sustain the original decision of the Supreme Court of the State of Wisconsin in **State ex rel. Froedtert G. & M. Co., Inc. v. State Commission,** (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478.

It is submitted that an analysis of the decisions cited under Points A and B do not sustain petitioners' claim.

The first, Point A, reads as follows:

> **"In State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, the Supreme Court of Wisconsin construed Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, as imposing a tax upon the devolution or transfer of dividends derived from the income of corporations arising out of corporate business transacted in this state or corporate property located in this state. The constitutionality of the tax was upheld as applied to domestic and foreign corporations against the objection that it contravened the Fourteenth Amendment to the Constitution of the United States in that it attempted to impose**

**a tax beyond the taxing jurisdiction of the state."** (page 22 of petitioners' brief)

The provisions of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, the tax law involved in the present controversies, so far as here material, read as follows:

> "Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and non-residents by the payor corporation.
>
> "(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission."

For the convenience of the Court, the entire law is printed as an Appendix to this brief.

Petitioners, on page 24 of brief, state:

> "The basis of the holding in the case of **State ex rel. Froedtert G. & M. Co. Inc. v. Tax Commission**, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, was as follows:
>
> "(1) The law imposes a tax upon the devolu-

tion or transfer from a corporation to its stockholders of income earned in the State of Wisconsin;

"(2) The law rests upon the same constitutional basis as laws taxing the devolution of property by death and other comparable laws taxing transfers;

"(3) Corporate earnings in the state of Wisconsin are taxable in Wisconsin, and the law in question merely serves to impose such a tax."

While it is not conceded that the decision in the **Froedtert case** nesessarily requires such unqualified conclusions, even assuming petitioners to be correct in the foregoing analysis, it is our contention that the Supreme Court of the State of Wisconsin was incorrect in sustaining Section 3 of Chapter 505, Laws of Wisconsin, as amended, in its original decision, as this law applied to foreign corporations. If we assume that the tax is a tax on the devolution of income earned within the State of Wisconsin, such of itself does not grant jurisdiction of the State of Wisconsin to tax unless the transaction which is attempted to be taxed also takes place within the State of Wisconsin, and the premise assumed in the **Froedtert** case that the law is comparable to tax laws taxing the devolution of property by death, as will hereafter be pointed out, wholly unsound. The mere fact that corporate earnings in the State of Wisconsin are taxable by Wisconsin, and, as a matter of fact had been taxed, under no stretch of the imagination permits the taxation of those earnings in a transaction which takes place wholly outside of the boundaries of the State of Wisconsin. Concededly, the corporate earnings earned in Wisconsin are

taxable in Wisconsin to the corporation, but the tax in question is not a tax on the corporate earnings as such while they are still within the State of Wisconsin, but taxes a transaction which possibly may include corporate earnings which have long since been removed from the State of Wisconsin.

Petitioners' Point B is as follows:

> **"The Supreme Court of Wisconsin in the case of State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, correctly applied the Fourteenth Amendment to the United States Constitution, as that amendment is construed by this court, in determining the constitutionality of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended."**

Under this point petitioners argue that, "since the Wisconsin Supreme Court in **State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,** (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, sustained the validity of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, **upon the theory that its constitutionality was determined by the same principles as apply to a determination of the validity of inheritance or estate taxes, it becomes necessary to determine whether, on the basis of such an analogy, the tax can be sustained under the Fourteenth Amendment to the United States Constitution as interpreted by the decisions of this Court."**

Petitioners state:

> "Had the Wisconsin Court in the present case

altered its position as to the construction of the law there would, of course, be no occasion for examining its constitutionality in the light of the analysis made in a prior decision."

We agree with petitioners that in the present case the Wisconsin Supreme Court did not alter its position as to the construction of the law, but did decide that the transaction sought to be taxed was outside the jurisdiction of the State of Wisconsin; and that under the **Connecticut General Life Insurance Company case**, there being no constructive situs within the State of Wisconsin for the taxation of the transaction of declaring and receiving dividends in the State of New York, there is no basis for an excise tax within the State of Wisconsin upon the dividend in question.

Petitioners, in analyzing the decisions of this Court, in which inheritance or estate taxes were involved, claim this Court has announced certain principles, the first of which is as follows:

> **"(1) 'Death duties rest upon the principle that death is the "generating source" from which the authority to impose such taxes takes its being, and "it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties."***" (citing cases)**

Death is the first step or the generating source from which the taxing authority derives its authority to impose a tax, but standing alone it does not grant to the taxing authority the right to impose death duties. The taxing authority must have some independ-

ent ground on which to predicate jurisdiction to tax, other than death alone. In all of the cases cited by petitioners in their brief the taxing authorities had some tangible independent ground on which to base their jurisdiction to tax, in addition to the original generating source of death.

**Tyler v. United States,** (1930, 281 U. S. 497, 502, 74 L. ed. 991, 50 S. Ct. 356, sets forth the first principle quoted by petitioners.

In this case this Court had before it the question of the validity of the Revenue Act passed by Congress September 8, 1916, imposing an estate tax upon the gross estate of a decedent. The particular question presented is whether the property owned by husband and wife, as tenants by the entirety, could be included, without contravening the Constitution, in the gross estate of the decedent spouse for the purpose of computing the tax "upon the transfer of the net estate."

It will be observed that in **Tyler v. United States** there was no question so far as the jurisdiction of Congress is concerned, to tax the particular phase of the estate involved. The United States clearly had jurisdiction over both the property involved and over the individuals involved, and the decision of the court that death "became the generating source of important and definite accessions to the property rights of the other," justifying a tax upon the transfer from the deceased person to the surviving tenant, was obviously correct. In the instant case, however, the original jurisdiction over the transaction is wholly lacking.

The next case cited by petitioners is **Knowlton v.**

**Moore,** 178 U. S. 41, 56, 57, 44 L. ed. 969, 975, 976, 20 S. Ct. 747, in which this Court had before it the question of the validity of the War Revenue Act of June, 1898, which imposed a tax upon legacies and distributive share of personal property.

The next case cited by petitioners is **New York Trust Company, et al. v. Eisner,** (1921), 256 U. S. 345, 65 L. ed. 963, 41 S. Ct. 506. This involved the constitutionality of the act of Congress of September 8, 1916, imposing a federal estate tax and the failure of this act to permit as a deduction in computing the federal estate tax the amount of state inheritance tax. This Court affirmed the decree upon the authority of **Knowlton v. Moore.** Here again we have a case in which no question of jurisdiction of the United States government over the person of the deceased and his property.

The next case cited by petitioners is **Stebbins v. Riley,** (1925), 268 U. S. 137, 69 L. ed. 884, 45 S. Ct. 424. This case came before this Court to review the determination of the Supreme Court of California upholding the constitutionality of an inheritance tax act of the State of California which permitted no deduction to be made in computing inheritance taxes for the amount of federal estate tax paid to the United States government. This Court affirmed the judgment of the Supreme Court of the State of California. Here again we have a case in which there was no question of jurisdiction of the State of California over the person of the deceased or his property.

Again, in the case of **Snyder v. Bettman,** (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803, this Court's de-

cision in no way involves jurisdiction to tax. The question involved was the authority of the act of Congress of June 13, 1898, to impose a succession tax upon a bequest to a municipality for public purposes.

In each one of the foregoing cases, the transaction upon which the tax was levied took place within the jurisdiction of the taxing authority and was not dependent upon, nor related to, some other transaction in which the state or the federal government would have no jurisdiction to tax.

Petitioners' second principle is as follows:

> **"(2) The power to impose transfer, succession, or legacy taxes is not dependent for its existence upon the power to regulate the transmission of property by death or upon the granting of a privilege to transmit or to receive property by death."** (citing cases)

Petitioners again cite **Stebbins v. Riley,** (1925) 268 U. S. 137, 69 L. ed. 884, 45 S. Ct. 424; **Snyder v. Bettman,** (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803; and **Knowlton v. Moore,** (1900) 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747—all of which have been analyzed above. We disagree with petitioners that the case of **Snyder v. Bettman,** (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803, announces any such principle in passing on the right of a state to impose an inheritance or succession tax.

This Court's pronouncement on that question, contained on page 252, had reference to the authority of Congress to impose such a tax, and is as follows:

> "This case must be regarded as definitely establishing the doctrine that the power to tax inheritances does not arise solely from the power to regulate the descent of property, but from the general authority to impose taxes upon all property within the jurisdiction of the taxing power. It has usually happened that the power has been exercised by the same government which regulates the succession to the property taxed; but this power is not destroyed by the dual character of our government, or by the fact that, under our Constitution, the devolution of property is determined by the laws of the several states."

This statement is in answer to the claim that Congress lacked the authority to impose a succession tax, because it did not have the power to regulate the descent of property, which power came from the states. In other words, this Court held that the Federal government's right to impose a tax upon the inheritance or succession did not fail because it had no power to regulate the descent of property, but its power came from the general authority to impose taxes upon all property within its jurisdiction, and there was no question about the jurisdiction of the United States over the property involved in that tax.

The case of **Stebbins v. Riley**, (1925) 268 U. S. 137, 69 L. ed. 884, 45 S. Ct. 424, does not state any such principle. It seems to us that these cases are authority for the principle that the power of the state to impose transfer, succession, or legacy taxes is dependent upon the power to regulate the transmission of property by death or upon the granting of a privilege to transmit or to receive property by death, that the taxing

unit has jurisdiction by reason of the domicile of the decedent or by reason of jurisdiction of the property of the decedent within the territorial jurisdiction of the taxing unit.

In the **Stebbins v. Riley case,** on page 145 of the United States Reporter, the Court said:

> "There are two elements in every transfer of a decedent's estate: the one is the exercise of the legal power to transmit at death; the other is the privilege of succession. Each, as we have seen, is the subject of taxation."

The "legal power to transmit at death" and the "privilege of succession" are both derived from the state, and the state may tax, if it has jurisdiction over either the deceased person, by reason of domicile, or the property of the deceased person.

The case, **Knowlton v. Moore,** (1900) 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747, does not sustain petitioners' second principle. In this case the claim was made that, if the taxes were not direct, they were levies on rights created solely by state law, depending for their continual existence on the consent of the several states, a volition which Congress had no power to control, and as to which it could not, therefore, exercise its taxing authority.

This Court held that Congress' power to impose a transfer, succession, or legacy tax was not dependent for its existence upon the power to regulate the transmission, but upon the general authority granted to Congress to impose taxes on all property within the jurisdiction of its taxing power.

The third principle which petitioners claim this Court has announced is as follows:

> "(3) **The power of a state to impose a transfer tax is not dependent upon the event of death in that state. None of the cases decided by the court places emphasis upon the place of that event. Neither does the power of a state to tax a transfer depend upon those acts necessary to effectuate the transfer taking place within the state's territorial jurisdiction and pursuant to its laws.**" (citing cases)

In the case of **Graves v. Elliott,** (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913, cited by petitioners, the Supreme Court was asked to say whether the State of New York may constitutionally tax the relinquishment at death by a domiciled resident of the State of New York of a power to revoke a trust of intangibles held by a Colorado trustee. This Court held at page 386 of the United States Reporter:

> "The essential elements of the question presented here are the same as those considered in No. 339, Curry v. McCanless, decided this day (307 U. S. 357, ante, 1339, 50 S. Ct. 900, 123 A. L. R. 162). As is there pointed out, the power of disposition of property is the equivalent of ownership. It is a potential source of wealth and its exercise in the case of intangibles is the appropriate subject of taxation at the place of the domicile of the owner of the power. The relinquishment at death, in consequence of the non-exercise in life, of a power to revoke a trust created by a decedent is likewise an appropriate subject of taxation."

Clearly, the foundation of jurisdiction to tax rested upon the determination that there was a property right subject to the jurisdiction of the State of New York.

The next case cited by petitioners is **Bullen v. Wisconsin,** (1916) 240 U. S. 625, 60 L. ed. 830, 36 S. Ct. 473. In this case this Court had before it the question of the inheritance tax of decedent, a resident of Wisconsin. The Supreme Court of that state affirmed a judgment for a tax upon a fund of nearly a million dollars, which the heirs and next of kin claimed could not be taxed in Wisconsin without violating the Fourteenth Amendment and the contract clause of the Constitution of the United States. The deceased formerly lived in Chicago, and after moving to Wisconsin, he continued to do some business in Chicago. He kept, in Chicago, the bonds, stocks and notes constituting the fund held in that city by trustee. In 1904 he repossessed the fund, but in 1907 he reconveyed the fund upon the former trusts. He died, a resident of Wisconsin, without ever repossessing the fund.

This Court, in affirming the judgment, said (page 631 of the United States Reporter):

> "The power to tax is not limited in the same way as the power to affect the transfer of property. If this fund had passed by intestate succession, it would be recognized that by the traditions of our law the property is regarded as a **universitas** the succession to which is incident to the succession to the **persona** of the deceased. As the states where the property is situated, if governed by the common law, generally recognize the law of the domicile as determining the suc-

cession, it may be said that, in a practical sense at least, the law of the domicile is needed to establish the inheritance. Therefore, the inheritance may be taxed at the place of domicile, whatever the limitations of power over the specific chattels may be, as is especially plain in the case of contracts and stock."

The **Bullen case** establishes nothing whatsoever except that the state of the domicile of the decedent would have the right to tax by reason of the fact that the law of the domicile would have determined the succession of the particular property involved, if it were not for the fact that the instrument executed by Bullen, which was not revoked, determined it in this particular case. The jurisdiction to tax rested upon the non-exercise of the power of appointment which was retained by Bullen.

We agree with petitioners that the cases cited establish the principle that the power of a state to impose a transfer tax is not solely dependent upon death in the state; but we still maintain that it cannot be claimed that these cases sustain petitioners' proposition that the constitutionality of the privilege dividend tax law is to be determined by the same principles as apply to a determination of the validity of inheritance, succession, or estate tax.

The fourth principle which petitioners claim this Court has announced is as follows:

> "(4) **If a state has jurisdiction to impose a tax upon property, it may impose a tax upon the devolution by death of such property.**" (citing cases)

The first case cited by petitioners is **Graves v. Elliot,** (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913, which we have analyzed under petitioners' third principle.

The next case cited is **Curry v. McCanless,** (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900, in which the question before this Court was whether the States of Alabama and Tennessee could each constitutionally impose death taxes upon the transfer of an interest in intangibles held in trust by an Alabama trustee, but passing under the will of a beneficiary decedent domiciled in Tennessee; and which of the two states could tax in the event that it is determined that only one state could constitutionally impose the tax. The Chancery Court of Tennessee decreed that the State of Alabama could lawfully impose the tax and that the inheritance tax law of Tennessee violated the Fourteenth Amendment insofar as it purported to impose a tax measured by the trust property disposed of by decedent's will. The Supreme Court of Tennessee reversed, and entered its decree declaring the trust property disposed of by decedent's will to be "taxable in Tennessee and not taxable in Alabama for purposes of death succession or transfer taxes."

Alabama had assessed a state inheritance tax on the trust property; no transfer tax had been assessed by the Tennessee taxing officials, but they asserted the right to do so.

The decree of the Supreme Court of Tennessee, denying the right of Alabama to tax, was reversed, in which this Court said at page 369 of the United States Reporter:

"Here, for reasons of her own, the testatrix, although domiciled in Tennessee and enjoying the benefits of its laws, found it advantageous to create a trust of intangibles in Alabama by vesting legal title to the intangibles and limited powers of control over them in an Alabama trustee. But she also provided that by resort to her power to dispose of property by will, conferred upon her by the law of the domicile, the trust could be terminated and the property pass under the will. She thus created two sets of legal relationships resulting in distinct intangible rights, the one embodied in the legal ownership by the Alabama trustee of the intangibles, the other embodied in the equitable right of the decedent to control the action of the trustee with respect to the trust property and to compel it to pay over to her the income during her life, and in her power to dispose of the property at death."

As we understand the decision of this Court in the case, **Curry v. McCanless,** analyzed above, it was that the inheritance tax imposed by Tennessee and Alabama did not deprive the taxpayer of his property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States, because, under the facts, each state had jurisdiction of the subject taxed, namely, intangible rights created by a testator. The right of Alabama grew out of the legal ownership in Alabama of the trustee of the intangibles, which have a business situs in Alabama; the right of Tennessee to tax was based on the right of a domiciled resident to control the action of the trustee with respect to the trust property and to compel the trustee to pay over to the grantor of the trust the income during the grantor's

life and the power retained in the grantor to dispose of the property at death.

In the next case cited by petitioners—**Rhode Island Hospital Trust Co. v. Doughton,** (1926) 270 U. S. 69, 70 L. ed. 475, 46 S. Ct. 256—this Court had before it the question of an assessment for inheritance tax sustained by the Supreme Court of the State of North Carolina on the intangible property of one George Briggs, a resident of Rhode Island and domiciled therein at the time of his death. He never resided in North Carolina. He died testate in October, 1919, leaving a large estate. Among other personal property left by Briggs, and passing to his executors under the will, were shares of stock in the R. J. Reynolds Tobacco Company which with declared dividends unpaid were valued at $115,634.50. The R. J. Reynolds Tobacco Company is a corporation created under the laws of the State of New Jersey and qualified to do business under the laws of the State of North Carolina. Briggs' certificates of stock in the Tobacco Company, passing under his will to his executor, were none of them in the State of North Carolina at the time of his death, and never had been while they were owned by him. The Commissioner of Revenue of the state assessed an inheritance tax upon $77,089.67—66 2/3 per cent of the total value of Briggs' stock, amounting to $2,658.85.

This Court, in reversing the judgment of the Supreme Court of North Carolina, said at page 80 of the United States Reporter:

**"The tax here is not upon property, but upon**

**the right of succession to property, but the principle that the subject to be taxed must be within the jurisdiction of the state applies as well in the case of a transfer tax as in that of a property tax. A state has no power to tax the devolution of the property of a nonresident unless it has jurisdiction of the property devolved or transferred.** In the matter of intangibles, like choses in action, shares of stock and bonds, the situs of which is with the owner, a transfer tax of course may be properly levied by the state in which he resides. So, too, it is well established that the state in which a corporation is organized may provide in creating it for the taxation in that state of all its shares, whether owned by residents or nonresidents. ***

"* * *. But whatever the view of the other courts, that of this court is clear, the stockholder does not own the corporate property. Jurisdiction for tax purposes over his share can not, therefore, be made to rest on the situs of part of the corporate property within the taxing state. North Carolina can not control the devolution of New Jersey shares. That is determined by the laws of Rhode Island where the decedent owner lived or by those of New Jersey, because the shares have a situs in the state of incorporation. There is nothing in the statutory conditions on which the Tobacco Company began or continued business in North Carolina which suggests that its shareholders subjected their stock to the taxing jurisdiction of that state by the company's doing business there.

"* * *

"We conclude that the statute of North Carolina, above set out, in so far as it attempts to subject the shares of stock in the New Jersey corporation, held by a resident of Rhode Island, to a transfer tax deprives the executor of Briggs

of his property without due process of law and is invalid."

The above case clearly requires that the subject matter which is to be taxed must be within the jurisdiction of the state in order to sustain the assessment of a valid tax. Furthermore, the court specifically held that no power existed in favor of the state to tax devolution of property of a nonresident unless it had jurisdiction of the property devolved or transferred. Applied to the instant case, Wisconsin clearly had no jurisdiction of the earnings of Wisconsin on which it had only paid an income tax in Wisconsin after such earnings were transferred outside the territorial boundaries of the state.

**Snyder v. Bettman,** (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803, is the next case cited by petitioners. This case was also cited under petitioners' second principle, and is analyzed under that principle.

The fifth principle which petitioners claim this Court has announced is as follows:

> **"(5) A state may tax the income of individuals and corporations derived from business transacted and property located in the state."** citing cases)

To support this fifth principle petitioners cite **Underwood Typewriter Company v. Chamberlain,** (1920) 254 U. S. 113, 65 L. ed. 165, 41 S. Ct. 45; **Travis v. Yale & Towne Mfg. Co.,** (1920) 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228; **Shaffer v. Carter,** (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221; and **United States Glue**

Company v. Oak Creek, (1918) 247 U. S. 321, 62 L. ed. 1135, 38 S. Ct. 499—all of which dealt with the right of the state to impose an income tax upon income earned within the state. These cases, by no stretch of the imagination, can be held to sustain the jurisdiction to tax a transaction merely because the transaction outside of the state may incidentally include income that was earned within the state.

On page 30 of their brief petitioners state that "The application of the analogy drawn by the Wisconsin Supreme Court between the tax here in question and a tax upon transfers by death necessarily results, in view of the foregoing, in establishment of the following propositions:

> **"'(a) The tax here in question is, as held by the Wisconsin Court, an excise upon the transfer of corporate earnings, which embraces the right to transmit and the right to receive.'"**

Assuming that the Court so held in its original decision (that the tax was an excise upon the transfer of corporate earnings), it is our claim, and the claim advanced before the Supreme Court of Wisconsin, and now decided by the Supreme Court of Wisconsin in this case, that the right to declare, transmit, and receive all of which takes place outside the State of Wisconsin cannot be taxed.

> **"(b) The state may tax the transfer notwithstanding the fact that it does not grant the privilege to make the transfer and may not regulate it."**

We disagree with petitioners. The state may not tax the transfer notwithstanding the fact that it does not grant the privilege to make the transfer and may not have the right to regulate it. None of the cases cited by petitioners sustains this principle.

> **"(c) The fact that dividends may be declared and paid outside the state pursuant to the law of another state does not deprive the state of the power to impose the tax in question."**
>
> **"(d) If jurisdiction to tax the thing transferred results in jurisdiction to tax the transfer, the State of Wisconsin may tax the devolution to corporate stockholders of corporate income earned in this state."**

The answer to this was given by this Court in **Connecticut General Life Insurance Company v. Johnson,** 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436. This Court said (page 81 of United States Reporter):

> "* * * It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

The State of Wisconsin lacks the jurisdiction to tax the thing transferred in this case—namely, dividends; therefore, it lacks the right to impose the tax in question.

On page 31 of their brief, petitioners submit the following question:

> **"(1) Is the devolution of income from a corporation to its stockholders a proper subject for the imposition of an excise tax?"**

To which we reply: We think it is, providing the devolution takes place within the state that is imposing the tax. If, however, the transaction of devolution does not take place within the state, there is no proper subject to tax.

Also on page 31, the question:

> **"(2) Do the considerations which have been held to justify the imposition of an excise upon the transfer of property resulting from death justify as well the imposition of an excise upon the transfer of corporate income from a corporation to its stockholders?"**

And our answer: We think not. The considerations which have been held to justify the imposition of an excise tax upon the transfer of property resulting from death are based on jurisdiction by reason of domicile.

Petitioners conclude under point (b):

> **"As we have indicated, it is not too much to say that protection of the laws of the state is invoked and given in order to create the subject of the transfer for the purpose of transfer. And the state, since it has jurisdiction to tax the subject of the transfer (citing cases), at the time of transfer, may tax the transfer."**

We assume that by "The subject of the transfer" petitioners mean income earned in Wisconsin. We have never contended, nor do we now contend, that the State of Wisconsin did not have authority to tax the income of respondent in Wisconsin; but we do contend that after the income has been removed from the State of Wisconsin, the State lacks jurisdiction to tax the declaration of a dividend out of Wisconsin earnings, the payment of expenses or losses, or any use made of the income outside the State of Wisconsin.

## POINT B.

THE WISCONSIN SUPREME COURT PROPERLY HELD THAT THE PRINCIPLES OF LAW ANNOUNCED BY THIS COURT IN THE CASE OF **CONNECTICUT GENERAL LIFE INSURANCE COMPANY v. JOHNSON,** 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436, WERE SQUARELY APPLICABLE TO THE CONSTITUTIONAL QUESTIONS IN THE INSTANT CASE, AND THAT ON THE AUTHORITY OF THAT CASE AND OTHER SETTLED PRINCIPLES OF CONSTITUTIONAL LAW THE WISCONSIN PRIVILEGE DIVIDEND TAX LAW, AS APPLIED TO THE RESPONDENT, WAS UNCONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

As hereinbefore pointed out, the Wisconsin Supreme Court has conclusively construed the statute in question as imposing an excise tax on the transaction of declaring and receiving dividends out of income dervied from property located and business transacted within the State of Wisconsin. As further pointed out, under a long line of decisions of this court such a construction by the state Supreme Court is binding and conclusive upon this court.

This Court recently had under consideration the right of a state to tax transactions which occurred without the state in considering the problems involved in **Connecticut General Life Insurance Company v. Johnson,** 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436. The decision of this Court in that case conclusive-

ly holds that a transaction to be taxed must occur within the boundaries of the taxing state. Chief Justice Rosenberry of the Wisconsin Supreme Court, in the opinion rendered in the case of **J. C. Penney Company v. State of Wisconsin and Elmer Barlow, etc.**, 233 Wis. 286, in holding the principles announced in the **Connecticut General Life Insurance Company case** applicable, stated at page 296 of the opinion in the Wisconsin Reporter as follows:

> "This determination of the Supreme Court of the United States clearly holds that the fact that a fund which became the subject of a transaction in the state of Connecticut was earned within the state of California and might have been taxed there, does not give the transaction in Connecticut a situs within the state of California for the purposes of taxation. In our view the California case is a stronger case for jurisdiction to tax by a state than is the present case because in that case nothing but insurance premiums paid in California were dealt with and in levying the tax upon the company which did the business in California the amount of the reinsurance premiums was deducted in cases where the reinsurance premium was paid to a company authorized to do business in California. In both cases the thing taxed is a transaction without the state made pursuant to a privilege or right granted by another state measured by the amount of a fund earned in the taxing state. Under the Conn. General Life Ins. Co. case, there being no constructive situs within the state of Wisconsin for the taxation of the transaction of declaring and receiving dividends in the state of New York, there is no basis for an excise tax within the state of Wisconsin upon the dividend in question. Certainly the

payment of a reinsurance premium on business done in the state of California to a company authorized to do business in California is more closely connected to California business than is the declaration of a dividend in the state of New York although that part of the dividend taxed accrued from earnings made in Wisconsin. If there is no situs for taxation purposes in the one case there certainly is not in the other. We are obliged to hold that the transaction of declaring and receiving the dividend in question was not taxable in the state of Wisconsin."

While the nature of the tax involved in the **Connecticut General Life Insurance Company case** is slightly different from the nature of the tax involved in the instant case, substantively there is no more jurisdiction to tax the transaction involved in the instant case than existed to tax the transaction involved in the Connecticut General Life Insurance Company case. Both alleged taxes were upon transactions which took place wholly outside of the boundaries of the taxing state. We submit that the holding of this Court in the **Connecticut General Life Insurance Company case** is conclusively authority against the constitutionality of the instant tax law.

1.

**Analysis of Petitioners' Points C and D.**

Petitioners' Point C reads as follows:

**"The Wisconsin Supreme Court in the instant case, while it adhered to the construction of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, laid down in the case of State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, erred in holding that the decision of this Court in Connecticut General Life Ins. Co. v. Johnson, (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436, required that the tax be invalidated as beyond the taxing jurisdiction of the State of Wisconsin under the Fourteenth Amendment to the United States Constitution."**

Petitioners attempt to make the point that the tax law here involved does not tax any transaction outside the state; that it assumes to lay a tax upon a devolution of income which, for taxable purposes, occurs within the state, and the power to tax the devolution is derived from the same source as the power to tax the income itself; namely, the power to tax Wisconsin earnings.

The only authority cited by petitioners is the dissenting opinion written by Justice Fowler in the instant case, who wrote the original opinion of the Wisconsin Court in **State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,** (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478.

In his dissent, Justice Fowler made the following comments:

"* * * The object of the California tax was the reinsurance premium received and contracted for in the state of Connecticut. The receipt and the contract were in no way connected with, in no way incidental to any transaction of the insurance company in California, and were in no way connected with or incidental to any earnings of the company from business conducted in California. The object of the instant tax is the declaration of a dividend made in New York on earnings of the plaintiff corporation through business transacted in the state of Wisconsin. The declaration of the instant dividend was connected with, was incidental to, related back to, the business conducted in Wisconsin on the earnings of which the tax was computed. The reason for the invalidity of the California tax does not apply to the instant case. * * *"

The fallacy of this reasoning seems to be in his holding that the object of the tax is the declaration of a dividend from earnings of the corporation from business transacted in the State of Wisconsin, and the declaration of the dividend was connected with, was incidental to, related back to, the business conducted in Wisconsin on the earnings of which the tax was computed. This seems to be based upon the theory that the State of Wisconsin has power to tax any act performed outside the state in which income earned within the state is used. To illustrate the fallacy of this doctrine:

Suppose A, a resident of Wisconsin, earns $50,000 income in Wisconsin, pays all taxes levied against it; then lawfully removes his domicile

and money to Minnesota and dies a resident of Minnesota, leaving said $50,000 on deposit in a Minnesota bank. Upon this theory, that the initial source of the income being Wisconsin, the widow, a resident of Minnesota, the ultimate recipient of the Wisconsin income, through the will of A, would be subject to an inheritance tax in Wisconsin.

To further illustrate the fallacy of the theory that Wisconsin can tax the ultimate recipient of Wisconsin income, would mean that Wisconsin could tax a Chicago merchant because he sold a Wisconsin wage earner goods and accepted in payment thereof the wage earner's Wisconsin pay check. A bank in New York would be subject to a Wisconsin tax because it received interest earned within Wisconsin by a Wisconsin corporation because it was the ultimate recipient of a Wisconsin income.

Under the United States Constitution, business cannot be jeopardized by Wisconsin retaining a constructive trust upon income earned within its borders when lawfully removed therefrom and tax the ultimate recipient thereof.

The Wisconsin Supreme Court, in the case of **J. C. Penney Company v. Wisconsin Tax Commission,** 289 N. W. 677, said (pages 681-682):

> "In the Froedtert case we rejected the contention that the tax was a tax on property (221 Wis. at page 235, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478) and rested the right of Wisconsin to

tax the dividend in question on the ground that that part of the dividend taxed having been earned within the state, the transaction of declaring and receiving the dividend had a situs within the state although the transaction took place in another state. In the Connecticut General Life Ins. Co. case, supra, the Supreme Court of the United States made the further statement: 'Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance, or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection.

" 'The grant by the state of the privilege of doing business there and its consequent authority to tax the privilege do not withdraw from the protection of the due process clause the privilege, which California does not grant, of doing business elsewhere. (Citing) Even though a tax on the privilege of doing business within the state in insuring residents and risks within it may be measured by the premiums collected, including those mailed to the home office without the state (Citing) and though the writing of policies without the state insuring residents and risks within it is taxable because within the granted privilege (Citing), there is no basis for saying that reinsurance which does not run to the original insured, and which from its inception to its termination involves no action taken within California, even the settlement and adjustment of claims, is embraced in any privilege granted by that state. (Citing) All that appellant did in effecting the reinsurance was done without

the state and for its transaction no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state.' * * *"

## POINT C.

THE MERE FACT THAT INCOME ORIGINALLY EARNED AND TAXED IN WISCONSIN IS REMOVED FROM THE STATE OF WISCONSIN AND LATER IS INCLUDED IN A TRANSACTION WHICH OCCURS WHOLLY OUTSIDE OF THE STATE OF WISCONSIN (IN THIS CASE, THE PAYMENT OF A DIVIDEND), CLEARLY DOES NOT GIVE TO THE STATE OF WISCONSIN JURISDICTION TO TAX THE TRANSACTION INVOLVED.

Petitioners' Point D reads as follows:

> **"The declaration and payment of dividends outside of the State of Wisconsin by a foreign corporation does not itself constitute an event taxable by Wisconsin and the Court below properly so held. Where the income distributed is derived from Wisconsin earnings, however, and thus forms the subject matter of the transfer, the State of Wisconsin acquires jurisdiction to tax the transfer."**

Petitioners state that in the case below the Wisconsin Supreme Court, in its analysis as to state jurisdiction, applied the following reasoning:

> (1) The exercise by a foreign corporation without the state of the power to declare and pay a dividend is not in itself taxable by the State of Wisconsin, since

(a) The privilege to declare the dividend is not granted by the State of Wisconsin, and

(b) The physical acts of declaring and paying the dividend do not occur within the territorial limits of Wisconsin.

(2) The fact that a dividend so declared and paid by a foreign corporation is derived from Wisconsin earnings does not empower the state to tax the transfer of such earnings effected by the declaration and payment of said dividend, since this Court had, in substance, so held in **Connecticut General Life Ins. Co. v. Johnson**, (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436.

**Petitioners do not disagree with the first proposition.** Petitioners admit that the State of Wisconsin may not, as an independent basis of taxation, tax the exercise of a privilege which it does not grant; nor may the State of Wisconsin, as an independent basis of taxation, impose a tax upon a transaction which occurs without its territorial jurisdiction; but they state that the present case does not turn upon any such consideration—that the law here involved does not assume to tax such a privilege granted by the State, as they say was stated by the Court in **State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission**, (1936) 221 Wis. 225, 230, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, **the tax is laid upon the exercise of a right.** Petitioners admit that foreign corporations derive the privilege of declaring and paying dividends from the states of their incorporation.

Petitioners attempt to make a distinction between a tax on **a privilege granted by the State** and a tax laid upon **the exercise of a right.** At the outset, we

will concede that a state which grants a privilege may tax that privilege, and the state, at the place where the right is exercised, may tax the right; but, as we understand the decision of the Wisconsin Supreme Court in this case below, the Court held, the exercising by a foreign corporation of a right outside the State of Wisconsin, and not granted by the State of Wisconsin, cannot be taxed by Wisconsin without violating the Fourteenth Amendment to the Constitution of the United States. The Court held that, the exercise by a foreign corporation without the state of the power to declare and pay a dividend is not itself taxable by the State of Wisconsin, because the privilege to declare the dividend is not granted by the State of Wisconsin, and the physical act, or the exercising of the right to declare and pay the dividend did not occur within the territorial limits of the State of Wisconsin.

Petitioners state:

> "These cases turn upon the application of a rule which, as we have pointed out, is well established by the decisions of this court, namely, that where property forming the subject of a transfer is taxable by the State, its transfer occurs within the jurisdiction of the State for tax purposes."

We do not agree that this is a correct statement of the rule as laid down by this Court, but, assuming it is correct, we fail to see its application to the tax in the instant case. In the instant case the so-called property which was the subject matter of the transfer

clearly was not, at the time of transfer, taxable by the State of Wisconsin. Petitioners again cite **Underwood Typewriter Company v. Chamberlain,** (1920) 254 U. S. 113, 65 L. ed. 165, 41 S. Ct. 45; **Travis v. Yale & Towne Mfg. Co.** (1920) 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228; **Shaffer v. Carter,** (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221; and **United States Glue Company v. Oak Creek,** (1918) 247 U. S. 321, 62 L. ed 1135, 38 S. Ct. 499. These cases do not sustain petitioners' position that the derivation of income from Wisconsin endow the State with power to tax a transfer of such earnings. It is conceded that as held by this Court, Wisconsin has power to impose an income tax upon respondent's income derived from Wisconsin (Chapter 71, Wisconsin Revised Stats. 1935), and it did impose an income tax. The privilege dividend tax, as was pointed out by the Supreme Court of Wisconsin in its decision in this case below and in the case of **State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,** (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, was not upon the income of respondent, or its shareholders, but was an excise tax upon the transaction involved. Petitioners, in commenting upon the decision of the Wisconsin Supreme Court in the **Estate of Bullen,** (1910) 143 Wis. 512, 128 N. W. 109, later passed upon by this Court, (1916) 240 U. S. 625, 60 L. ed. 830, 36 S. Ct. 473, and the case of **Graves v. Elliott,** (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913, said:

> "In each of these cases the instrument pursuant to which the property was transferred was

executed without the State that was permitted to impose a transfer tax, and in each case the instrument was executed pursuant to the law of the State of its execution."

We understand the basis of the decisions of this Court in the **Estate of Bullen** to be the tax imposed by Wisconsin, and in **Graves v. Elliott, tha tax imposed** by New York and Colorado, was not a tax imposed upon a transfer made at the time the instrument creating the trusts was executed. In the **Bullen case** the transfer was made in Illinois, and made in accordance with the laws of the State of Illinois. In the **Graves case** the transfer was made in Colorado, and made in accordance with the laws of the State of Colorado. The tax in Wisconsin and New York was a tax, at the place of decedent's domicile, upon the relinquishment at death, in consequence of the non-exercise in life of a power to revoke a trust in intangible property created by a decedent.

Earnings of a corporation made in Wisconsin, even though removed from the state, may be subject to an income tax by Wisconsin, but the fact that Wisconsin may tax respondent's income, and did tax it, does not legalize a tax such as we have here, which taxes a transaction which takes place outside the jurisdiction. We do not understand any decision of this Court in holding, if the income had a situs for tax purposes in one state, any transfer of it in another state would be subject to tax in the state where the income was earned.

Petitioners contend it is not necessary that the

State of Wisconsin measure any tax exacted by the total net income of a corporation, but that the State can measure its exaction by that part of the net income which is distributed to its shareholders; that the fact that a tax is measured by the "amount of dividends declared" cannot be made the basis of a tenable constitutional objection to a tax imposing a tax so measured; that the use of "amount of dividends declared" as the measure of a tax is not only proper, but just and equitable. Measuring of taxes by dividends paid is not new, but is supported by precedent of long standing, Pennsylvania, New York, and the Federal Government.

The New York law, referred to by petitioners, was Chapter 361, Laws of New York, 1881. This tax law was before this Court in **Home Insurance Co. v. New York,** (1890), 134 U. S. 594, 33 L. ed. 1025, 10 S. Ct. 593. This Court said, at page 599 of the U. S. Reporter:

> "The Statute designates it a tax upon the 'corporate franchise or business' of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year."

The New York law used dividends only as a yardstick in measuring the rate of tax—the tax was imposed regardless of whether or not any dividends were paid.

In this case it should be noted that the State of New York had jurisdiction over the subject taxed—namely, the corporate franchise or business, and the State

also granted to the corporation the right to declare dividends. Regardless of the state in which the dividends were declared, if dividends were the subject of the tax, the tax would have been valid.

Sections 182 and 186, Article 9, Chapter 60, Consolidated Laws of the State of New York, referred to by petitioners in their brief, are franchise taxes imposed upon utility companies—the rate being determined by dividends made and declared during the year. This law is still in effect, and, as we understand it, is the same as Chapter 361, Laws of New York, 1881, which was considered by this Court in **Home Insurance Co. v. New York**, (1890) 134 U. S. 594, 33 L. ed. 1025, 10 S. Ct. 593. This law originally imposed a franchise, or business, tax upon all corporations. Later all corporations, except utility, were excluded from tax under this section, as amended, and were subject to other franchise taxes. This Court sustained this franchise, or business, tax assessed against a foreign corporation doing business pursuant to the authority granted by the State of New York in the case of **Horn Silver Mining Co. v. New York**, (1892) 143 U. S. 305, 36 L. ed. 164, 12 S. Ct. 403.

It is clear that the State of New York had jurisdiction of the subject taxed—namely, the franchise granted by the State of New York to the foreign corporation, or the business transacted within its borders by this corporation. As pointed out by petitioners on page 53 of their brief, Pennsylvania has imposed a franchise tax upon corporations to be computed at the rate of one-half mill upon the capital stock for each 1 per cent of dividends made or declared

during the year, but if no dividends were made or declared during the year, or if the dividends made or declared were less than 6 per cent of the capital stock, the capital was to be appraised and taxed at three mills upon each dollar of valuation. Here again we have a tax upon a franchise or privilege in which the only part the dividends play is the yardstick to measure the rate, and the tax does not fail if no dividends are declared, the corporation is still subject to tax.

The Act of Congress of 1864, as amended, which petitioners refer to, reads as follows (the pertinent provisions):

> "Any such company that may have declared any dividend in scrip or money, due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company, carried to the account of any fund, or used for construction, shall be subject to and pay a tax of 5 per centum on the amount of all such interest or coupons, dividends, or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens." (Page 301, 84 U. S.)

This Court first considered this statute in **Barnes v. The Railroad,** (1873) 17 Wall. (84 U. S.) 294, 21 L. ed. 544, and in **Bailey v. N. Y. C. & H. R. R. Co.,** (1875) 22 Wall. (89 U. S.) 604, 22 L. ed. 840; but not upon any constitutional objection, but to determine if the act applied to certain transactions.

In **Railroad Co. v. Collector** (1879) 10 Otto (100 U.

S.) 595, 25 L. ed. 647, this Court passed upon the constitutionality of the act. The Court, on page 598, said:

> "The tax, in our opinion, is essentially an excise on the business of the class of corporations mentioned in the statute. The section is a part of the system of taxing incomes, earnings and profits adopted during the late war, and abandoned as soon after that war was ended as it could be done safely. The corporations mentioned in this section are those engaged in furnishing road-ways and water-ways for the transportation of persons and property, and the manifest purpose of the law was to levy the tax on the net earnings of such companies. How were these 'earnings, profits, incomes or gains' to be most certainly ascertained? In every well conducted corporation of this character these profits were disposed of in one of four methods, namely: distributed to its stockholders as dividends, used in construction of its roads or canals, paid out for interest on its funded debts, or carried to a reserve or other fund remaining in the hands of the Company. Looking to these modes of distribution as the surest evidence of the earnings which Congress intended to tax, and as less liable to evasion than any other, the tax is imposed upon all of them."

The Act of Congress of 1864, cited by petitioners and analyzed herein, was not a tax upon dividends as held by this Court, but was an excise tax on the transaction of business by a corporation. The excise tax was measured by the net income of the corporation.

Instead of stating that the net income consisted of the gross income less business deductions, Congress, in arriving at the net income, did so by four

methods, namely: (1) distributions to stockholders as dividends, (2) plus amounts used in construction of roadbeds and canals, or improvements, (3) plus amounts paid out for interest on its funded debts, (4) the amount carried to a reserve or other fund remaining in the hands of the company. In short, this adds up to using the net income to measure the tax.

These cases are apparently cited by petitioners to sustain their contention that it is not necessary that the state measure any tax exacted by the total net income of the corporation but the tax can be measured by that part of the income which is distributed to shareholders. We agree with petitioners that if the State of Wisconsin has jurisdiction of the subject of the tax that it may do so, but we do not agree that the tax involved in these cases was upon dividends. The tax involved was upon the corporate franchise of business and was a tax upon the corporation regardless of whether or not a dividend was made or declared.

The Act of Congress of 1864, above referred to, like Chapter 361, Laws of New York 1881, and the Pennsylvania Laws referred to by petitioners on page 53 of their brief, does not depend for its existence upon any declaration of a dividend. The tax under the Act of Congress of 1864 would be the same even though the corporation failed to declare a dividend. In that case the net income would be arrived at by taking the amount paid out for construction plus interest plus amount carried to reserve and held by the company.

On page 55 of petitioners' brief they state the most

recent federal tax measured by dividends is the Act of Congress of June 16, 1933, known as the National Industrial Recovery Act, Chapter 90, Section 213 (a) (48 Stats. at Large, pt. 1, page 206), the pertinent provision of which reads as follows:

> "213(a). There is hereby imposed upon the receipt of dividends (required to be included in the gross income of the recipient under the provisions of the Revenue Act of 1932) by any person other than a domestic corporation, an excise tax equal to 5 percentum of the amount thereof, such tax to be deducted and withheld from such dividends by the payor corporation."

This tax was an excise tax upon each recipient of dividends other than domestic corporations, and was a tax upon stockholders and not upon the payor corporation. The General Counsel, Bureau of Internal Revenue, so held when he issued the following ruling which is reported in Cumulative Bulletin XII-2-39-6419 and is known as G. C. M. 12206:

> "Where a corporation pays the excise tax on dividends paid by it to its stockholders, the amount of such tax constitutes an additional dividend. The withholding liability of the payor corporation must be computed upon the dividend plus such tax. The stockholders are required to report the dividend plus the tax in gross income and may claim a deduction for the tax paid at the source."

Petitioners, in conclusion, contend, as they contended in their petition for certiorari, that under the

decision of **Barnes v. The Railroad,** (1873) 17 Wall. (84 U. S.) 294, 21 L. ed. 544, and under the decision of **Railroad Co. v. Collector,** (1879) Otto (100 U. S.) 595, 25 L. ed. 647, that the tax in question is one in substance imposed upon the corporation required to pay it.

The case of **Barnes v. The Railroad,** as previously pointed out, does not sustain petitioners' contention that the tax is one imposed upon the corporation because it is required to withhold and collect it. At page 301 this Court said:

> "Stripped of every difficulty of that kind as the case confessedly is the great central question which arises is, what did the law makers mean when they enacted that 'any such company that may have declared any dividend in scrip or money, due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund or used for construction, shall be subject to and pay a tax of 5 per centum on the amount of all such interest or coupons, dividends, or profits, whenever and wherever the same shall be payable * * *' "

As previously pointed out, the tax in question was a tax upon the corporation and not upon the shareholders and accrued and was due from the Railroad Company regardless of whether a dividend was made or paid, where, in the instant case, no tax was due or accrued to the State of Wisconsin until a dividend was declared and paid.

In the case of **Railroad Company v. Collector,** the

constitutionality of the law in question was before this Court, and this Court held that it was an excise tax upon the corporation's business measured by income, and the tax accrued regardless of whether a dividend had been paid or not; that the amount of dividends was only one of the yardsticks used by Congress to measure the amount of the income of the corporation.

The tax in the instant case is a tax upon the stockholders and not upon the corporation. The intent of the legislature was to impose a tax on stockholders. This clearly appears from the statute, which provides as follows:

> "Such tax shall be deducted and withheld from such dividends payable to residents and non-residents by the payor corporation."

The ruling of the Federal Treasury Department Bureau of Internal Revenue, I. T. 3002 XV-35-8264 (page 4), held that the Wisconsin privilege dividend tax is an excise tax imposed upon the stockholder receiving the dividend.

In the case of **State ex rel. Sallie F. Moon Co. v. Tax Commission,** 166 Wis. 287, 163 N. W. 639, 165 N. W. 470, it was said at page 293 of the Wisconsin Reporter in the concurring opinion of Chief Justice Winslow:

> "* * * when dividends are declared out of them, such dividends become in every proper sense income in the hands of the stockholders."

The court, by construing the tax to be on the cor-

poration, would be disregarding and thwarting the manifest legislative intent.

In the case of **Heiner v. Donnan,** 285 U. S. 312, 76 L. ed. 772, 52 S. Ct. 358, the United States Supreme Court laid down the following rule at page 331 of the United States Reporter:

> "* * * For this court to do so would be to enact a law under the pretense of construing one, and thus pronounce itself guilty of a flagrant perversion of the judicial power."

In the recent case of **Colorado National Bank v. Bedford,** (1940) 60 S. Ct. 800, 84 L. ed. 730, this Court had before it the Colorado Sales and Service Tax Act, which, it was claimed, imposed a tax upon a National Bank in violation of law. This Court—in holding the tax to be on the bank's lessee and not upon the bank—said:

> "The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself. The funds which were received by the State came from the assets of the user, not from those of the federal instrumentality, the bank. The Colorado Supreme Court holds the user is the taxpayer. The determination of the state court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling. As the user directly furnishes the funds for the tax, not as an ultimate consumer with a transferred burden but by Section 12 of the act as the responsible obligor, we conclude the tax is upon him not upon the bank. The Constitution or laws of the United States do not forbid such a tax"

This court has determined in several other analogous cases that the tax is against the party who is ultimately burdened therewith.

**United States v. Baltimore & Ohio R. R. Co.,** 84 U. S. 322, 21 L. ed. 597.
**Home Savings Bank v Des Moines,** 205 U. S. 503, 27 S. Ct. 571.
**Merchants' & Manufacturers' Nat. Bank of Pittsburgh v. Commonwealth of Pennsylvania,** 167 U. S. 461, 17 S. Ct. 829.
**Des Moines Nat. Bank v. Fairweather,** 263 U. S. 103, 44 S Ct. 23.
**United States v. Commissioners of Sinking Fund,** 169 U. S. 249, 18 S. Ct. 358.
**Heiner v. Donnan,** 285 U. S. 312, 52 S. Ct. 358.
**Oliver v. Washington Mills,** (Mass.), 11 Allen 268.
**First National Bank v. Chehalis,** 166 U. S. 440, 17 S. Ct. 629.
**First National Bank v. Kentucky,** 9 Wall. 468.

It is further well settled law that the property of a corporation is not property of the stockholders and that the property interests of the corporation and of the stockholders are separate and distinct.

**Eisner v. Macomber,** 252 U. S. 189, 64 L. ed. 521, 40 S. Ct. 189.
**First National Bank of Boston v. Maine,** 284 U. S. 312, 76 L. ed. 313, 52 S. Ct. 174.
**Rhode Island Hospital Trust Co. v. Doughton,** 270 U. S. 69, 70 L. ed. 475, 46 S. Ct. 256.
**Beidler, et al v. South Carolina Tax Commission,** 282 U. S 1, 75 L. ed. 131, 51 S. Ct. 54.
**Klein v. Board of Supervisors,** 282 U. S. 19, 75 L. ed. 140, 51 S. Ct. 15.
**Owensboro National Bank v. Owensboro,** 173 U. S. 664, 43 L. ed. 851, 19 S. Ct. 537.
**Estate of Shepard,** 184 Wis. 88, 197 N. W. 344.

The property of the corporation is not the property of the stockholders. The Supreme Court of the United States has declared that the property of the shareholders, their respective shares, is distinct from the corporate property, franchises and capital stock. The corporation and its stockholders are separate entities.

The cases cited by petitioners involved taxes which were held to be taxes against corporations rather than against the stockholders, and have no application to the controversy involved in the instant case.

Wisconsin has no power to impose an income tax on dividends received by non-residents from a foreign corporation, which does business in Wisconsin. The corporation and its stockholders are separate and distinct entities, and the stockholders have no legal title to the property held in the name of the corporation or the income made by said corporation in Wisconsin, and the non-resident does not transact business within Wisconsin merely because he happens to own stock in a foreign corporation which does business in Wisconsin. The business carried on by the corporate entity constitutes the business of the corporation and not the business of the individual stockholders. A tax against the corporation does not constitute a tax against the stockholders. The power to tax the corporate entity does not include the power to tax the non-resident stockholder entity.

**West v. Tax Commission**, 207 Wis. 557, 242 N. W. 165.

**Oliver v. Washington Mills** (Mass.) 11 Allen 268.

**Cleveland, Painesville & Ashtabula R. R. Co. v. Pennsylvania,** 15 Wall. 300, 326, 21 L. ed. 179, 186.

**Domenech v. United Porto Rican Sugar Co.,** 62 Fed. (2d) 552 (Certiorari denied 289 U. S. 739, 53 S. Ct. 656).

## POINT D.

### THE DECISION RENDERED BY THE SUPREME COURT OF THE STATE OF WISCONSIN IN THE INSTANT CASE, PROPERLY APPLIED THE RELEVANT PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES AND PROPERLY CONSTRUED AND APPLIED THE DECISIONS OF THIS COURT WITH RESPECT TO JURISDICTION OF THE STATE OF WISCONSIN TO LEVY THE TAX IN QUESTION.

The decision of the Supreme Court of the State of Wisconsin in the instant case, to the effect that no jurisdiction to tax existed because the transaction taxed occurred wholly outside of the boundaries of the State of Wisconsin, is clearly in accordance with repeated pronouncements of this Court.

In **Connecticut General Life Insurance Company v. Johnson** (1938) 303 U. S. 77, 58 S. Ct. 436, 82 L. ed. 673, this Court stated at page 80 of the U. S. Reporter:

> "*** Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the State power to tax or regulate the corporation's property and activities elsewhere. *** It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions

which the corporation carries on outside the state if it were induced to carry them on within."

The decision of this Court in the **Connecticut General Life Insurance Company** case is in line with a long series of decisions of this Court denying jurisdiction to tax on any such theory as petitioners attempt to urge in the instant case.

**Provident Savings Life Assurance Society v. Kentucky,** (1915) 239 U. S. 103, 36 S. Ct. 34.

**Beidler v. South Carolina Tax Commission,** 282 U. S. 1, 51 S. Ct. 54.

**James v. Dravo Contracting Company** (1937) 302 U. S. 134, 58 S. Ct. 208.

**Rhode Island Hospital Trust Company v. Doughton** (1926) 270 U. S. 69, 46 S. Ct. 256.

**Wachovia Bank & Trust Company v. Doughton** (1926) 272 U. S. 567, 47 S. Ct. 202.

**Farmers Loan & Trust Company v. Minnesota** (1930) 280 U. S. 240, 50 S. Ct. 98.

**Baldwin v. Missouri,** 281 U. S. 586, 50 S. Ct. 436.

The decision of the Supreme Court of Wisconsin in the present case is wholly consistent with the decisions of this Court. The foundation for the decision of the Supreme Court of Wisconsin rested upon no novel grounds, but on settled fundamental principles of constitutional law. The efforts of counsel for petitioners in an attempt to avoid its force, with tenuous arguments to establish constructive situs, are, we submit, without foundation either upon principle or upon authority.

## POINT E.

THE TAX LAW IN QUESTION IS UNCONSTITUTIONAL NOT ONLY UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, BUT IS UNCONSTITUTIONAL UNDER SEVERAL OTHER PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES.

The tax law in question is, in the opinion of counsel for the respondent, vulnerable under several other federal constitutional grounds in addition to that which the Supreme Court of the State of Wisconsin said fit to adopt.

These additional constitutional grounds were properly urged before the Wisconsin Supreme Court but the court did not consider them in view of its determination that the tax was invalid as applied to the respondent, because the acts of the respondent which the tax attempted to reach were beyond the jurisdiction of the State of Wisconsin. There is summarily stated herein, however, various additional constitutional grounds, in addition to that relied upon by the Supreme Court of the State of Wisconsin, under which respondent contends that the law in question is unconstitutional as applied to it.

**(1) The Tax Impairs Respondents obligation on its contract with its stockholders, and accordingly is unconstitutional and void under Article 1, Section 10, Constitution of the United States, and Article 1, Section 12, Constitution of the State of Wisconsin.**

The respondent cited the following cases and statutes in support of its position:

**Federal Constitution**, Section 10, Article I.
**Wisconsin Constitution**, Section 12, Article I.
**Dartmouth College v. Woodward**, 4 Wheat. 518, 4 L. ed. 629.
**State ex rel. Cleary v. Hopkins Street Building & Loan Assn.**, 217 Wis. 179, 257 N. W. 684.
**Continental Insurance Co. v. Minneapolis, Saint Paul & Sault Ste. Marie Railway Co.**, 290 Fed. 87, 31 A. L. R. 1320, certiorari denied, 263 U. S. 703.
**Federal Mining & Smelting Co. v. Wittenberg**, 15 Del. Ch. 409, 138 Atl. 347.
**Peters v. United States Mortgage Co.**, 114 Atl. 598.
**Delaware Incorporation Act, Revised Code of Delaware**, Section 34.
**Wittenberg v. Federal Mining & Smelting Co.**, 138 Atl. 347, 352.
**Hoeper v. Tax Commission of Wisconsin**, et al., 284 U. S. 206, 52 S. Ct. 120.
**Bailey v. New York Cent. & H. R. R. Co.**, 106 U. S. 109, 1 S. Ct. 62.
**Wisconsin Privilege Dividend Law**, Sec. 4.
**Fletcher, Cyc. Corp.**, Vol. 11, (Perm. Ed.) Sec. 5322, page 786.
**7 Thompson on Corporations** (3rd Ed.), Sec. 5308, page 1831, et seq.
**Beidler v. South Carolina Tax Commission**, 282 U. S. 1, 51 S. Ct. 54.

**State Tax on Foreign-held Bonds**, 15 Wall. 300, 21 L. ed. 179.

**First National Bank of Boston v. Maine**, 284 U. S. 312, 52 S. Ct. 174.

**New York L. E. & W. R. Co. v. Pennsylvania**, 153 U. S, 628, 38 L. ed. 846, 14 S. Ct. 952.

**(2) This tax is unconstitutional under Article IV, Section 1 of the Constitution of the United States, because it fails to give full faith and credit to the public acts of Delaware.**

The respondent cited the following cases and statutes in support of its position:

**U. S. Constitution**, Article 4, Section 1.

**Bradford Electric Light Co. v. Clapper**, 286 U. S. 145, 52 S. Ct. 571.

**Modern Woodmen of America v. Mixer**, 267 U. S. 544, 45 S. Ct. 389.

**Supreme Council of the Royal Arcanum v. Green**, 237 U. S. 531, 35 S. Ct. 724.

**(3) The law in question imposes a tax on interstate commerce and, consequently is unconstitutional under Article I Section 8 of the Constitution of the United States.**

The respondent cited the following cases and statutes in support of its position:

**Wisconsin Session Laws of 1935, Sec. 3, Ch. 505.**

**International Text-Book Co. v. Pigg,** 217 U. S. 91, 30 S. Ct. 481.

**Norfolk & Western Railway Co. v. John R. Sims,** 191 U. S. 441, 24 S. Ct. 151.

**Alpha Portland Cement Co. v. Commonweath of Massachusetts,** 268 U. S. 203.

**(4) The law as applied to the respondent is unconstitutional under Article I, Section 8 of the Constitution of the United States, in that it taxes federal instrumentalities.**

The respondent cited the following cases and statutes in support of its position:

**Macallen Co. v. Commonwealth of Massachusetts,** 279 U. S. 620, 49 S. Ct. 432.

**Miller v. City of Milwaukee,** 272 U. S. 713, 47 S. Ct. 280.

**Northwestern Mut. Life Ins. Co. v. Wisconsin,** 275 U. S. 136, 48 S. Ct. 55.

**Home Savings Bank v. Des Moines,** 205 U. S. 503, 27 S. Ct. 571.

**Schuylkill Trust Co. v. Commonwealth of Pennsylvania,** 296 U. S. 113, 56 S. Ct. 31.

**State of Missouri v. Gehner,** 281 U. S. 313, 50 S. Ct. 326.

**National Life Ins. Co. v. United States,** 277 U. S. 508, 48 S. Ct. 591.

**Laws of Wisconsin of 1935,** Ch. 505, Sec. 3, Subdiv. 5.

**Revised Statutes of Wisconsin,** Sec. 71.25 (2).

**(5) The law is unconstitutional because it denies the respondent the equal protection of the laws and is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 1 of the Constitution of the State of Wisconsin, and further is unconstitional under Article VIII, Section 1 of the Constitution of the State of Wisconsin, Because the tax is not uniform.**

The respondent cited the following cases and statutes in support of its position:

**Louisville Gas & Electric Co. v. Coleman,** 277 U. S. 32, 48 S. Ct. 423.

**Hanover Fire Ins. Co. v. Carr,** 272 U. S. 494, 47 S. Ct. 179.

**Hopkins v. Southern California Tel. Co.,** 275 U. S. 393, 48 S. Ct. 180.

**Concordia Fire Ins. Co. v. Illinois,** 292 U. S. 535, 54 S. Ct. 830.

**Quaker City Cab Co. v. Pennsylvania,** 277 U. S. 389, 48 S. Ct. 553.

## CONCLUSION.

It is respectfully submitted that the State of Wisconsin had no jurisdiction to impose a tax on the dividends declared by respondent outside of the State of Wisconsin, and that under settled rules of constitutional law, as determined by this Court, the decision of the Wisconsin Supreme Court to the effect that no jurisdiction to tax such dividends existed is correct, and accordingly the judgment of that court should be affirmed.

Respectfully submitted,

FREDERICK J. MILLER,
Ryan Block,
Little Falls, Minnesota.
JOHN L. CONNOLLY,
900 Fauquier Ave.,
St. Paul, Minnesota.
G. BURGESS ELA,
1 West Main Street,
Madison, Wisconsin.
Attorneys for Respondent.

# APPENDIX.

Section 3, Chapter 505, Laws of Wisconsin, 1935, Effective On Its Publication on September 26, 1935, and as Amended by Chapter 552, Laws of Wisconsin, 1935, Effective on Its Publication on October 8, 1935, Provides:

"Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and non-residents by the payor corporation.

"(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

"(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

"(4) In the case of corporations doing business within and without the State of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the State of

Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state.

"(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

"(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipts of dividends from which a privilege dividend tax has been deducted and withheld and the distribution thereof to its stockholders.

"(7) For the purposes of this section, dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividends or liquidating dividends.

"(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty

of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

"(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury."

(**Note:** The same provisions are now contained, with some additions, in the present Wisconsin tax laws. See Section 71.60, Wis. Stats. 1939.

Chap. 309, Sec. 3, Laws of Wisconsin, 1937, extended its date of applicability to July 1, 1939.

Chap. 198, Sec. 1, Laws of Wisconsin, 1939, extended its date of applicability to July 1, 1941, and increased the rate of tax to 3 per cent.)

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